

employees from entering its offices without establishing a reasonable basis for excluding each employee concerned.⁴

B. Reasonableness of USWC Rate Structure

1. Central Office Construction Charges

(a) Assessment of Non-Recurring Charges to Recover Construction Costs (II.B.2.(a))

TDL submits that interconnectors should be permitted to assign interconnector-specific facilities to other interconnectors, or to sublet interconnector space, since USWC claims its rates may cover the present value of the full depreciation expense. Alternatively, and with respect to the non-recurring charge paid by the interconnector for equipment, any equipment for which the interconnector paid a non-recurring charge should be considered the interconnectors' property so that the interconnector may reuse that equipment if it terminates its interconnection arrangement in one office in favor of interconnection in another office.

2. Electric Power Charges (II.B.3)

Interconnectors should not be charged based upon the fees to amperage of power provided, when alternative and more precise methods of measuring power used without over-recovery are possible. For example, power can be metered, the current draw of the equipment actually used can be reported by the interconnector, rather than the fused amperage being used for calculation of power

⁴ Indeed, USWC's limitation would appear to be the equivalent of a non-compete provision to prevent interconnectors from hiring current or former USWC employees or, in other words, to limit the pool of job applicants residing in the interconnectors' area of operations who have experience in their relevant field.

utilization, and in the event that the interconnector chooses to install backup power supplies, many such commercial power backup supplies include power monitoring capability.

3. Extraordinary and Unanticipated Costs (II.B.4.)

USWC includes in its tariff a 20% margin for extraordinary and unanticipated construction costs. TDL believes that this provision is unreasonable and will result in extraordinary profits to USWC. USWC's central office space has been designed for the purpose to which it will be put by the interconnectors and, thus, there should be no extraordinary and unanticipated costs. Indeed, the costing and pricing of operation should take into account the average cost of construction and, thus, above-average costs are already taken into consideration. In the event that a truly extraordinary cost was incurred by a particular interconnector's collocation, for reasons peculiar to the collocation proposal, it would be appropriate for the cost or expenses to be recovered by a collocater-specific surcharge.

C. LEC Provisions Regarding Interconnection Space Size, Expansion and Location (II.C.)

USWC's expressed concern for fostering competition among interconnectors appears noble, but USWC fails to acknowledge that its approach maintains a playing field -- one at a lower level than that on which USWC operates. Although the potential exists for abuses between competing special access providers, and in the future between competing switched access providers, USWC simply is not the appropriate party to serve as an arbiter of such disputes. In addition, USWC's safeguard against abuses may to preclude or

limit legitimate investment by interconnectors. Indeed, for the Commission to permit LECs to adopt tariff provisions to prevent interconnector abuse, which tariff provisions the LECs are quick to point out, may have the color and effect of law, may well constitute an improper and unlawful delegation of authority.

No LEC tariff provisions are necessary or appropriate to prevent abuses by interconnectors in the reservation of collocation space. It is reasonable for interconnectors to reserve that amount of space which they reasonably anticipate will meet their injected requirements, estimated in good faith, for the foreseeable future. If a competing interconnector is prevented from obtaining collocation space, and an existing collocated interconnector is occupying space which is not being put to use, then the interconnector seeking collocation space has adequate remedies available to it. These remedies would include complaints to the Commission, and the filing of claims under the antitrust laws or state laws of unfair competition. Most significantly, however, it is within the province of the interconnector who is denied space, not USWC, to pursue remedy for such abuses.

Finally, in this regard, TDL notes that the reasonableness of an interconnector reserving space beyond its immediate needs would impact upon the available space for expansion (which would also constitute limitations on space for other collocators). This approach could create an incentive for LECs to adopt tariff collocation policies and restrictions which might force collocating interconnectors to request more space than they might otherwise

require, to assure adequate room for expansion, an additional and otherwise unnecessary expense. The Commission should therefore make clear that tariff policies or actions such as allocating collocation space and configurations to make it a practical requirement that interconnectors lease as much space as they anticipate needing or face the potential of having non-contiguous collocation spaces (and requiring more space and greater expense than if one single larger space was constructed) are unreasonable under the Communications Act. The Commission should also make it clear that upon a finding of unreasonableness after investigation of a complaint by the interconnector, the LEC could be required to modify the collocation space of interconnectors at LEC's sole expense to provide contiguous interconnector space. In making any such requirement, the Commission should also make it clear that any costs to the LEC as a result of such actions must be charged against net revenues and borne by the LEC's shareholders to assure that (i) the LEC does not trade upon its monopoly rate base to compete unfairly with the interconnectors, and (ii) there is an economic mechanism in place which should result in the replacement of current management if current management is unwilling or unable to comply with Commission interconnection requirements in the public interest.

D. LEC Prohibitions Against Expanded Interconnection With Dark Fiber Service Are Unreasonable And Inconsistent With The Special Access Order (II.D.)

USWC's tariff prohibition on dark fiber EIC is unreasonable and contrary to the Commission's Special Access Order. USWC states

that its dark fiber offerings are only available between two customer premises. In fact, however, USWC does not require that those premises be owned as opposed to leased, nor does the Commission's Special Access Order mandate that an interconnector have constructed itself and own all of its network facilities as a condition to qualification for expanded interconnection and collocation. USWC's argument only highlights its Nineteenth Century view that a carrier must own all portions of its physical network in order to operate as a service provider. That is not necessarily the model of today's telecommunications market, nor the model under which increasing competition can best develop and the needs of consumers can best be met.

Unless the Commission is willing to allow USWC to impose tariff provisions prohibiting sharing or resale of its tariffed services, it should not permit USWC to prohibit terminations of dark fiber service at non-owned collocation premises.

E. USWC's Tariff Denies Interconnectors Reasonable Control Over Channel Assignment On The Interconnectors' Networks (II.E.)

USWC attempts to justify its requirement that interconnectors install a DSX in their collocated space for purposes of connecting with USWC. Nevertheless, USWC concedes that this DSX does not provide interconnectors the same flexibility in channel assignment as if they were to connect directly to USWC's MDF, but suggests interconnectors purchase additional equipment to obtain the same flexibility in channel assignments. USWC Direct Case, at 85. USWC has not, however, provided any legitimate reason for precluding

interconnectors from connecting directly to its MDF, and avoiding the additional and unnecessary expenses USWC would place upon them.

F. LEC Provisions Regarding Warehousing Re: Efficient Use of Space (II.F.)

See TDL's discussion of this issue at Section II.C., above.

G. USWC Provisions Regarding Notice In The Event Of Service Termination (II.G.)

USWC describes as reasonable its tariff provisions which (i) permit it to terminate a collocation agreement upon only thirty (30) days' notice when collocators must give ninety (90) days' notice; (ii) permit it to terminate service for a breach of USWC's EIC tariff and to evict a collocator for a material breach; and (iii) which treat the creation or existence of a lien upon the interconnectors' property within a USWC central office as such a material breach. These provisions are not reasonable and would work to prevent fair competition. There is no reason why both USWC and the collocator should not have equivalent notice obligations with respect to termination of a collocation agreement. Second, USWC's ability to terminate service or collocation upon its claim of breach of the tariff will allow it to hold a hammer over the heads of its competitors, and to threaten termination of or substantial harm to their business unless the interconnector agrees to a "settlement agreement". While the ability of a carrier to terminate service may be more appropriate where a carrier is dealing with an end user customer, the EIC tariff provides a much different situation where the LEC's customer is a competitor to the LEC for access to essential facilities and services from the LEC.

In these circumstances, USWC should be ordered to modify its tariffs to provide that USWC may only terminate service or evict an interconnector for a tariff violation in the event that (i) there is an undisputed and material tariff violation, (ii) the tariff dispute has been finally resolved in USWC's favor, or (iii) USWC obtains an order from the Commission permitting termination of service or eviction upon posting of a suitable bond. Only in this way can the LECs be prevented from using their vast resources to eliminate their competition other than in the marketplace.

TDL recognizes that additional burdens may be placed upon the Commission's Common Carrier Bureau to entertain and rule upon such disputes. TDL notes, however, that disputes requiring Commission resolution may be unavoidable because of the Commission's mandate for special access interconnection and collocation. TDL submits, however, that the Commission adopt the requirements that parties filing bad faith complaints or, applications with the Commission may be required to pay their opponents' cost of responding to, and the Commission's costs of hearing and ruling upon, any bad faith or unfounded filings. Such a provision should deter any party from raising a purported dispute solely to avoid an otherwise proper disconnection of service, which is probably the only reason USWC will assert against requirement of the above-described tariff revisions.

H. LEC Termination of Collocation Upon Catastrophic Loss At A Central Office (II.I.)

TDL believes that, as with other circumstances addressed by the Commission, the likelihood of catastrophic loss at an LEC

central office is sufficiently small, and the range of circumstances so large, that no specific standard or provision can apply in all circumstances. For this reason, TDL submits that it may be necessary for the Commission to adopt a more general rule, such as one requiring that LECs cooperate reasonably with collocators in the event of such catastrophic loss to address and accommodate both the immediate and long-term needs of any affected interconnector. Reliability in interruption of communication services is the primary interest of telecommunications customers and is essential for competitors in the marketplace. Thus, the most immediate and important priority in all cases must be to restore service to any and all affected customers and service providers and, secondly, to restore redundant service to any and all affected customers and providers. Instances of culpability, responsibility and long-term arrangements can be addressed after full redundant service is restored. Moreover, a requirement that LECs act reasonably in such situations should give ample guidance to LECs while permitting the Commission to define what is reasonable upon such real life disputes and facts as may be presented. The LECs should also be required to include in their tariff the same standard of reasonable action in the event of catastrophic loss.

I. Reasonableness of USWC Relocation Provisions (II.J.)

USWC states that it has no present intention of unilaterally relocating any interconnectors' leased physical space or equipment, but that in certain circumstances USWC may offer to provide

interconnectors with the option of moving their space or their equipment, at USWC's expense. Direct Case, at 116. TDL believes that USWC's position in this regard is reasonable, but is more concerned with the potential for disruption of service than with the potential relocation of collocation space and equipment within a USWC central office. That is, as stated above, reliability and non-interruption of communications are of primary and increasing importance to telecommunications customers in the marketplace. Thus, in the event that USWC should provide interconnectors with the option of moving their space or equipment, USWC's obligations should include, in addition to bearing the expense of the move, the provision of interim equipment of equal quality and capacity at USWC's expense, while any relocation is accomplished, to minimize the disruption to the interconnectors' services.

J. LEC Liability Provisions (II.L.)

TDL believes that the best way to assure that LEC liability provisions are reasonable is to require any liability provisions to be reciprocal. That is, the LECs should not impose upon interconnectors any more stringent standards of liability, nor any less stringent standards of liability, than those upon the LEC with respect to liability to the interconnector.

K. USWC Provisions Regarding Letters of Agency (II.N.)

The public interest and TDL's customers are best served by the greatest flexibility in the provision of their telecommunications service. Thus, end users, other carriers, and others ordering the telecommunications service should be able to order their entire

service from an interconnector such as TDL, order the competing service from USWC, or order select components from each of several competing carriers they best see fit. Permitting the use of letters of agency, and permitting customers to order service configured for each service provider to bill separately for its portion of the services, will best meet the customers and the public's need.

L. LEC Provisions Regarding Inspections Of Interconnector Space And Facilities (II.O.)

In the event that LEC's are permitted to inspect interconnector space and facilities, the LECs should be permitted to inspect interconnector space and facilities only with adequate notice (at least fifteen (15) days) and no more than once every twelve (12) months. LECs should also be permitted to inspect the interconnector space and facilities upon initial installation, unless the ordinances of the city or municipality in which the central office is located require inspection by city inspectors. In such case, there would appear to be no legitimate reason for USWC to complete a second inspection. The cost of any inspection USWC elects to make should be made by USWC.

M. LEC Provisions Regarding Payment of Taxes and Assessments (II.P.)

TDL believe it is reasonable for USWC's tariff to prohibit interconnectors from placing, permitting to be placed or acquiescing in any lien being placed upon the property or facilities of the LEC to secure an obligation of the interconnector. Further, it would be reasonable for the LEC to

require indemnification against any costs for placement of such a lien upon the LEC's property or other culpable conduct by the interconnector resulting in the placement of a lien upon the property or other assets of the LEC.

CONCLUSION

USWC has filed a tariff which will burden its special access competitors with unreasonable requirements and obligations, as well as USWC overhead and profit, if the competitors are to collocate and interconnect with essential facilities. Such unreasonable requirements cannot be countenanced, and appropriate tariff revisions should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph P. Benkert, do hereby certify that on this 20th day of September, 1993, I have caused a copy of the foregoing **COMMENTS ON DIRECT CASE** to be served via first class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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